IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated:- 18-12-2007

Corm:-

The Hon'ble Mr. Justice R.REGUPATHI

CRL.O.P.No.24412 of 2004
and
Crl.M.P.No.7912 of 2004

K. Meenakshi ... Petitioner/Accused

vs

S. Mohana ... Respondent/Complainant

Petition filed under Sec.482 of the Code of Criminal Procedure for the relief as stated therein to call for the records concerning in C.C.No.212/2003 on the file of the Judicial Magistrate, Tambaram and quash the same.

For petitioner : Mr.T.D.K.Govindarajan
For respondents : Mr.P.N.Prakash

O R D E R

The above petition is filed seeking for a direction to call for the records relating to C.C.No.212/2003 on the file of the Judicial Magistrate, Tambaram and quash the same.

2. The petitioner is an accused for the offence punishable under Sec.138 of Negotiable Instruments Act. The learned Magistrate, after recording the sworn statement of the complainant, has taken the case on file and issued summons to the petitioner on payment of process fee. Though the petitioner has taken up the proceedings before the learned Magistrate, the present petition to quash the proceedings has been filed before this Court on certain technical grounds.

3. Learned counsel for the petitioner, at the first instance, has referred to the docket entries/endorsements made by the learned Magistrate on various dates. On 03.04.2003, the learned Magistrate made the following endorsement on the complaint made before him:-

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"Check and Call on 10.4.2003",

and, on 10.4.2003, the following endorsement came to be made,

> "Complainant called absent. Hence complaint is dismissed for default."

That being so, subsequently, by making the following entry,

> "Complaint filed with complainant. Complied and re-presented".

on 24.4.2003, the learned Magistrate ordered for issuance of summons as follows:

> " Perused the records. Sworn statement taken. Taken on file under Sec.138 NI Act. Issue summons on payment of process fee. Call on 24.7.03. "

According to the learned counsel, the endorsement/order of the learned Magistrate made on 10.4.2003 virtually amounts to dismissing the complaint for want of prosecution and such order having become final, the subsequent proceedings of the Magistrate in restoring the complaint to file and issuing summons to the petitioner are wholly untenable and unwarranted. To substantiate such contention, he relied on the judgment of the Hon'ble Supreme Court reported in 1988 (1) R.C.R 3 (S.C) (Major General A.S. Gauraya and Another vs S.N. Thakur and Another), wherein, it has been observed that once the complaint is dismissed for non-appearance of the complainant, it is a final order and the Magistrate has no inherent power to restore the case. By submitting that the learned Magistrate should not have reopened the case by himself to take cognizance of the offence, learned counsel seeks to quash the proceedings.

4. Per contra, learned counsel for the respondent/complainant submits that the order dated 10.4.2003 cannot be construed as an order passed after taking cognizance of the offence. On 03.04.2003, though the complaint was presented before the learned Magistrate, the endorsement made was only to the effect, "Check and Call on 10.04.2003" and on 10.4.2003, at the time when the complainant was called for further proceedings, she was absent and therefore, the learned Magistrate dismissed the complaint for default and it does not mean that the Magistrate had applied his mind to the allegations made in the complaint and passed a judicial order so as to constitute the status of a final order. At best, the endorsements dated 03.04.2003 and 10.04.2003 must be construed as office endorsements. Subsequently, the complainant appeared on 24.04.2003 and made an endorsement to substantiate her presence, whereupon, the learned

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Magistrate restored the complaint to his file on the same day and after recording her sworn statement, issued summons to the accused. The order passed on 24.04.2003 being a judicial order, the earlier endorsement made by the learned Magistrate need not be taken into consideration and since no prejudice is caused to the petitioner/accused on account of this, the complaint need not be quashed.

5. Learned counsel for the respondent relied on the case law reported in (2004) 1 SCC 691 (State of M.P vs Awadh Kishore Gupta) and submitted that all courts, whether civil or criminal, possess, in the absence of any express provision, as inherent in their constitution, all such powers as are necessary to do the right and to undo a wrong in the course of administration of justice on the principle quando lex aliquid alicui concedit, concedere videtur id sine quo res ipsa esse non potest (when the law gives a person anything it gives him that without which it cannot exist). He further submits that the order passed by the learned Magistrate, taking cognizance on 24.04.2003, is well within his power.

6. I have perused the materials available on record and heard the submissions made by both sides.

7. On a perusal of the docket entries made, it appears that the entry dated 10.4.2003 was made by the learned Magistrate as the complainant remained absent. Before taking a complaint on his file, it is mandatory that the Magistrate shall follow the procedure laid down under Sec.200 Cr.P.C, which reads as follows:

> " 200. Examination of complainant:-- A Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses and also by the Magistrate.
>
> Provided that, when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses-
>
> (a) if a public servant acting or purporting to act in the discharge of his official duties or a Court has made the complaint; or
>
> (b) if the Magistrate makes over the case for inquiry or trial to another Magistrate under Section 192;
>
> Provided further that if the Magistrate makes over the case to another Magistrate under Section 192 after examining the Complainant and the witnesses, the latter Magistrate need not re-examine them.

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8. The present complaint is by a private party for the offence punishable under Section 138 of Negotiable Instruments Act and not by a public servant. Therefore, the presence of the complainant and his/her examination on oath is absolutely necessary before taking the complaint on file. Since on 10.04.2003 the complainant was called absent, an endorsement was made, dismissing the complaint for default. Dismissal of a complaint could be made only after the same is taken on file. In the instant case, it appears that the learned Magistrate, even before issuing process to the accused, has dismissed the complaint for default viz., for the absence of the complainant. Sec.256 Cr.P.C deals with non-appearance of complainant, which reads as follows:

> " 256.Non-appearance or death of complainant:- (1) If the summons has been issued on complaint, and on the day appointed for the appearance of the accused, or any day subsequent thereto, to which the hearing may be adjourned the complainant does not appear, the Magistrate shall, notwithstanding anything hereinbefore contained, acquit the accused, unless for some reason he thinks it proper to adjourn the hearing of the case to some other day:
>
> Provided that where the complainant is represented by a pleader or by the officer conducting the prosecution or where the Magistrate is of opinion that the personal attendance of the complainant is not necessary, the Magistrate may dispense with his attendance and proceed with the case,
>
> (2) The provisions of sub-section(1) shall, so far as may be, apply also to cases where the non-appearance of the complainant is due to his death".

9. Section 256 Cr.P.C is the only provision which deals with dismissal of a complaint leading to acquittal of the accused and it will be applicable only after the complaint is taken on file and summons are issued to the accused and on the day appointed for the appearance of the accused, on his/her appearance and if the complainant does not appear, the Magistrate shall acquit the accused unless for some reason he thinks it proper to adjourn the hearing of the case to some other day. The object of the provision is that Courts should take serious note of absence of the person, who approaches the Court to set the law in motion, when the accused person makes himself present before Court for enquiry.

10. On 24.04.2003, at the time when the complaint was taken on file, the accused/petitioner did not have any role to play. Only after summons are issued, the role of the accused commences, as she is aggrieved by the orders of the learned Magistrate. The Order dated

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10.04.2003 cannot be ascribed to be a judicial order, but could be construed only as an Office Note made on the complaint for certain compliance. Unless all the requirements stipulated under Section 200 Cr.P.C are complied with, the learned Magistrate cannot proceed further on the basis of the complaint made. In the absence of dismissal of a complaint on merits, there is no bar for filing even a second complaint on the same set of facts and allegations.

11. Under such circumstances, I am of the considered view that no prejudice has been caused to the accused/petitioner and the contentions that the endorsement dated 10.04.2003 must be taken as final order and that the respondent/complainant has only appeal remedy against such endorsement are not well founded. It follows that the action of the learned Magistrate in taking the complaint on file is well within his jurisdiction and is in consonance with the procedure prescribed under the Code and therefore, the present petition filed under Sec.482 Cr.P.C to quash the proceedings is not well founded.

The petition stands dismissed as devoid of merits. Consequently, the connected Crl.M.P is closed.

Sd/
Asst.Registrar

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Sub Asst.Registrar

sr/JI.

To

The Judicial Magistrate, Tambaram.

+1cc to Mr.R.S.Jeevarathanam, Advocate Sr 74860
+1cc to Mr.P.N.Prakash, Advocate sr 75007

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